

# e-Competitions

Antitrust Case Laws e-Bulletin

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The Indian Company Law Appellate Tribunal clarifies the emerging jurisprudence on hub-and-spoke cartel and standing requirements in a case concerning two ride-hailing platforms in the automobile services market for fixing cab fares through their apps (*Uber / Ola*)

**ANTICOMPETITIVE PRACTICES, CARTEL, CONCERTED PRACTICES, MARKET SHARING, RELEVANT MARKET, PRICE FIXING, JUDICIAL REVIEW, INDIA, TRANSPORT (ROAD), ONLINE PLATFORMS, ALGORITHMS**

Indian Company Law Appellate Tribunal, *Uber / Ola*, No.11 OF 2019, 29 May 2020

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**Rahul Singh** | Khaitan (New Delhi)

**Swati Bala** | Khaitan (New Delhi)

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In a relief to the multinational giant, Uber, and home-grown Ola (collectively, Ride-hailing Platforms), the National Company Law Appellate Tribunal (NCLAT) – India’s appeal tribunal for competition matters – dismissed an appeal filed by Samir Agrawal (Informant). In doing so, the NCLAT has upheld the decision of the Competition Commission of India (CCI) and turned down the hub and spoke conspiracy alleged to be coordinated by the Ride-hailing Platforms with their drivers. Incidentally, as has been noticed in several past CCI cases, the Informant in this case was a practising advocate. As detailed below, this order is significant due to three reasons – (i) the emerging jurisprudence on a hub-and-spoke cartel; (ii) algorithm-based pricing; and (iii) clarification on Informant’s standing (or, locus standi) requirements in terms of the Indian Competition Act 2002 (Competition Act).

## Background and facts

The Informant had alleged, amongst other things, that the Ride-hailing Platforms through their apps (hubs) facilitate cartels among their drivers (spokes) to anticompetitively fix cab fares. The CCI, however, found no prima facie infringement of the Competition Act and ordered closure without any Director General’s investigation. Unsurprisingly, the Informant appealed. The NCLAT used the opportunity to clarify the hub-and-spoke jurisprudence, algorithm-based pricing, and standing (or, locus standi) requirements.

*Hub-and-spoke collusion among drivers*

In terms of the Competition Act, the existence of an 'agreement' is a sine qua non to establish collusion, including a hub-and-spoke cartel. The NCLAT reiterated this position and noted that the Informant had failed to prove that the drivers agree among themselves to set fares through the apps.

The Informant had argued that when drivers sign identical pricing terms with the Ride-hailing Platforms, their common knowledge of the state of competition on pricing translates into a meeting of their minds. According to the Informant, this implied an agreement. Based upon the reasoning that the Ride-hailing Platforms do not act as an association of drivers, this argument did not find favour with either the CCI or the NCLAT. Both the CCI and the NCLAT were influenced by the finding that although the drivers acceded to the algorithmically determined prices of the apps, there was no agreement amongst the drivers to delegate the pricing power to the apps.

### *Algorithm driven cab fares*

While acknowledging the theoretical possibility of algorithm-based price-fixing or a cartel, the CCI had noted that algorithmically determined fares of Ola and Uber are based on several variables like distance, time, day, traffic, and thus, are not collusive. The NCLAT agreed with the CCI analysis and observed that such fares accepted by drivers are not collusive. The appeal tribunal underscored that drivers while accepting rides, have no opportunity to coordinate with the others on fares.

### *Standing requirements*

On the issue of standing (or, locus standi) of the Informant to file the complaint, the NCLAT noted that a plain construction of the statute indicates a complaint, alleging a contravention of the provisions of the Competition Act, may be filed by 'any person'. Regardless, the appeal tribunal held that the phrase 'any person' used in the statute refers to only those who suffer legal harm "as a consumer or beneficiary of healthy competitive practices". Accordingly, the NCLAT held that the Informant lacked standing as he had not suffered any legal harm as a consumer of the Ride-hailing Platforms. While dismissing the appeal, the NCLAT also observed that the allegation of price discrimination in terms of any potential abuse of a dominant position is groundless as neither of the Ride-hailing Platforms had a dominant position in the relevant taxi services market.

### **Key takeaways**

A cartel between horizontally situated competitors (spokes), in terms of competition law theory, could be coordinated through an indirect information exchange via a vertically situated supplier or retailer or any third party or platform (hub). Such arrangements, which have been seen in 'mature' jurisdictions, are referred to as a hub-and-spoke cartel. The hub, in such context, could be considered as a participant of the cartel.

The Indian jurisprudence on the hub-and-spoke cartel is still emerging. The proposed 2020 amendment to the Competition Act – with a recommendation to introduce monetary fines for hub- and-spoke cartels – is likely to keep the debate alive.

Note that through this decision, the appeal tribunal concurred with the CCI finding that the sine qua non of a hub-and-spoke cartel is an inter se price-fixing agreement between the drivers (spokes). Interestingly, the appeal tribunal and the CCI do not explain circumstances in which algorithm-driven pricing may raise collusion concerns or may constitute an anti-competitive 'agreement'. On the issue of an agreement, the NCLAT underscored two aspects:

- The Ride-hailing Platforms do not function as an association of drivers as the latter ‘have the liberty to negotiate a lower fare’; and
- There is no information exchange either between the platforms and the drivers or between the drivers.

In sum, the impact of this decision is not confined to Ride-hailing Platforms. There has been a noticeable spurt in the platform-based digital economy, which has been characterised as ‘tipping markets’ in other contexts. The issue of the hub-and-spoke cartel is likely to remain ripe for adjudication by competition agencies in developing and emerging economies, such as India and other jurisdictions.

There is yet another noteworthy aspect of this judgment. For the purposes of ‘standing’ it adopts an unusual interpretation of the phrase ‘any person’ used in the statute. Note that the Indian competition law does not require a person lodging a complaint to prove harm. This unusual interpretation is at odds with the CCI’s duty to undertake market correction [1] and promote competition [2]. Au contraire, on other occasions, the CCI has asserted that its proceedings are (i) inquisitorial [3] and (ii) “not in personam in the nature of a private lis between two parties but are rather proceedings in rem affecting an entire market”. [4] The CCI, in the past, has also asserted that the antecedents of an Informant are not relevant for taking cognisance of abusive conduct. [5] Whilst the objective of the NCLAT to curtail frivolous litigation may be laudable, a carte blanche against non-consumers or whistle-blowers or socially conscientious citizens might move the needle towards another extreme.

There are two possibilities: Firstly, the NCLAT may reconsider its holding in another case. Secondly and more importantly, this judgment is appealable to the Supreme Court of India, which has not dealt with the above issues until now. In sum, the jury is still out on contours of a hub-and-spoke cartel and standing requirements in the Indian competition law.

[1] Indian Motion Picture Producers’ Association v Federation of Western India Cine Employees (CCI, Case No. 45 of 2017) decided on 18 April 2018 <<https://www.cci.gov.in/sites/default/files/Case%20No.%2045%20of%202017.pdf>> ↗; accessed 11 June 2020

[2] Section 18 and the preamble of the Competition Act

[3] XYZ v Indian Oil Corporation (CCI, Case No. 5 of 2018) <<https://www.cci.gov.in/sites/default/files/Case%20No.%2005%20of%202018.pdf>> ↗; accessed 11 June 2020

[4] Velankani Electronics Private Limited v Intel Corporation (CCI; Case No. 16 of 2018) decided on 9 November 2018 < <https://www.cci.gov.in/sites/default/files/case-no-16-of-2018.pdf> ↗ > accessed 10 June 2020

[5] Matrix Info Systems Private Limited v Intel Corporation (CCI; Case No. 5 of 2019) decided on 9 August 2019 <<https://www.cci.gov.in/sites/default/files/05-of-2019.pdf>> ↗; accessed 10 June 2020